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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

ALBERT A. ALLEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Defendant Albert Allen was given immunity in 1990 and required to testify before a grand jury (which he did) concerning criminal allegations against two other individuals. The immunity order also required, broadly and unspecifically, that Allen testify "in any trial or other further proceedings resulting from or ancillary to [his grand jury testimony]," although it did not restrict his freedom of movement in any way. Years later, in 1993, a trial was scheduled for the other two individuals (who later pleaded guilty) and a trial subpoena was issued for Allen. Allen avoided service and the subpoena was never served. Allen was indicted for and (upon his conditional plea) convicted of criminal contempt under 18 U.S.C. §401(3) for willfully refusing to obey the subsequent testimony provision of the 1990 immunity order. Allen's sentence includes an assessment of $110,000 in costs. The district court's refusal to dismiss the indictment was affirmed in a reported opinion of the Sixth Circuit. On March 22, 1996, Allen died. His wife, Barbara Allen, moves under SUP. CT. R. 35.1 to be substituted as a party.

I. Should certiorari be granted to consider whether the federal criminal contempt statute, under canons of interpretation of criminal statutes applied by this Court since *United States* v. *Wiltberger*, is violated by an individual named in an immunity order containing a subsequent testimony provision who, when a trial subpoena is issued years after the order, avoids service of the subpoena but does not attempt to assert a Fifth Amendment right not to testify?

II. Should certiorari be granted to consider whether this Court's practice, since *Dove* v. *United States*, of dismissing certiorari petitions upon the petitioner's death applies in a criminal case that is not moot because the government asserts that the petitioner's estate is liable for $110,000 in costs and the petitioner's spouse has moved under SUP. CT. R. 35.1 to substitute the authorized representative of petitioner's estate as a party?*

LIST OF PARTIES

Pending decision of the SUP. CT. R. 35.1 motion that accompanies this petition, the names of all the parties appear in the caption of the case. The motion requests that the authorized representative of the estate of Albert Allen be substituted as a party. Undersigned counsel believes that Albert Allen's wife, Barbara Allen, will become the estate's authorized representative in state court proceedings that have not occurred yet.

* This issue is raised conditionally, and will be abandoned if Barbara Allen's motion to be substituted as a party in place of her late husband is granted. The issue is presented here because Albert Allen died five days before the deadline for filing this petition and counsel does not know how this Court will rule on the SUP. CT. R. 35.1 motion. This petition will be abandoned in its entirety if the government decides not to proceed against the estate of Albert Allen for the recovery of money.

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IN THE SUPREME COURT OF THE UNITED STATES
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ALBERT A. ALLEN,

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Petition for a Writ of Certiorari to the
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PETITION FOR WRIT OF CERTIORARI

The petitioner, Albert A. Allen, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled proceeding on December 28, 1995. In the alternative, Allen requests a summary disposition on the merits under SUP. CT. R. 16.1.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit, reported at 73 F.3d 64, is reprinted in the appendix following this petition (1a-10a).

The orders of the United States District Court for the Eastern District of Michigan (Bernard A. Friedman, Judge) denying the petitioner's motion to dismiss the indictment,

and the current amended judgment, all unreported, are reprinted in the appendix (11a-19a).

JURISDICTION

Petitioner was charged with criminal contempt of court in violation of 18 U.S.C. §401(3) (R.1, Indictment, 20a-21a), an "offense against the laws of the United States" under 18 U.S.C. §3231, of which the United States District Court for the Eastern District of Michigan had subject matter jurisdiction. Petitioner was convicted of violating §401(3) under a conditional guilty plea, Fed.R.Crim.P. 11(a)(2), and timely appealed.

The Court of Appeals for the Sixth Circuit had jurisdiction of petitioner's appeal under 28 U.S.C. §1291 and rendered its decision affirming the conviction on December 28, 1995 (1a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTE INVOLVED

Section 401 of Title 18 of the United States Code provides that "[a] court of the United States shall have the power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other" [listing the categories, of which the third is:] "Disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

STATEMENT OF THE CASE

On September 13, 1990, the United States District Court for the Eastern District of Michigan (Judge Paul V. Gadola) issued an immunity order in *In re Grand Jury Proceeding*, Misc. No. 90-1677, requiring Allen to testify before a special grand jury (3a, 37a-38a). The order granted use immunity "as to all matters and questions which he may be interrogated before said Special Grand Jury and in any trial or other

further proceedings resulting therefrom or, ancillary thereto." (38a).

Allen testified five times before the grand jury in 1990 and 1991 (3a).[1] Thereafter, Vito Giacalone and N.C. Deday LaRene were indicted for tax fraud and income tax evasion on September 16, 1992. *United States* v. *Vito Giacalone and N.C. Deday LaRene*, E.D.MI. Criminal No. 92-80848 (3a-4a).[2] According to the docket sheets in No. 92-80848, the district court (Judge Patrick J. Duggan) issued jury trial notices on October 1, 1992, December 10, 1992, and January 14, 1993 (43a, 44a, 45a). The government did not issue any trial subpoenas for Allen to appear on any of the noticed trial dates.

On February 3, 1993, Judge Duggan rescheduled the trial for June 14, 1993 (46a). On April 20, 1993, the government issued a trial subpoena for Allen to appear as a witness in Criminal No. 92-80848 (39a-40a). A government agent then contacted Allen's counsel to see if he would accept service of the trial subpoena (31a). On April 26, Allen's counsel advised the agent that it would be necessary for him to personally serve Allen with the trial subpoena (32a). The government was unable to locate Allen and failed to serve him with the subpoena (32a). The June 14, 1993 trial date

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[1] Allen's grand jury testimony centered on the government's original theory that Allen was the victim of an extortion scheme committed by Vito Giacalone. Later, the government's theory changed and "[t]he focus of the investigation . . . turned to tax evasion" by Giacalone and N.C. Deday LaRene. *United States* v. *Forman*, 71 F.3d 1214, 1215 (6th Cir. 1995).

[2] Excerpts from the docket sheets in *United States* v. *Giacalone, et al.*, Criminal No. 92-80848 are at 41a-50a. Complete docket sheets were included in the lower court record.

was rescheduled to July 12, 1993 (47a). Later the trial was again rescheduled to October 19, 1993 (47a).

On September 14, 1993, Allen was indicted by a federal grand jury in the Eastern District of Michigan for the offense of "criminal contempt in violation of 18 U.S.C. §401(3) and Rule 42, Federal Rules of Criminal Procedure" (21a).

The indictment charged Allen with his refusal, beginning in April 1993 and continuing to the date of the indictment, to "make himself available for service of a subpoena" (20a), which the indictment claimed was "a willful refusal to obey a lawful order of the United States District Court, that is an immunity order dated September 13, 1990, signed by Honorable Paul v. Gadola, which requires ALBERT A. ALLEN to testify both before the grand jury and at any future trial" (20a).

On November 16, 1993, Allen voluntarily appeared before a U.S. Magistrate Judge on the criminal contempt indictment (5a, 32a). The plea agreements of Giacalone and LaRene were filed in No. 92-80848 on December 21 and 22, 1993 (48a), and in 1994 they entered pleas of guilty and were sentenced to terms of imprisonment (49a-50a).

Allen filed a motion to dismiss the indictment (22a) in March 1994 under Fed.R.Crim.P. 12(b)(1) and (2), contending that the indictment was defective because it did not charge an offense under 18 U.S.C. §401(3) (23a-24a). The district court heard oral argument from the parties the following month and denied the motion without stating reasons on the record (Tr 1, 27-34). The denial is reflected in orders entered in May and November 1994 (R.29 and R.51; 11a, 13a).

On November 18, 1994, Allen, his counsel and the government executed a Fed.R.Crim.P. 11 plea agreement that reserved the right to appeal the denial of the motion to dismiss (R.49; 28a). On that same date (after the government presented its factual proofs to the court), Allen entered a

guilty plea to the indictment (Tr 35-49). The district court reserved the issue whether the offense was a misdemeanor or felony (Tr 48-49). After the parties briefed that issue and argued it on the day of sentencing (February 9, 1995), the district court determined to treat the offense as a felony (Tr 50-58). The court then imposed a sentence of one day custody, with credit for time served, home confinement for 180 days, and costs in the amount of $110,000. Imposition of the sentence was held in abeyance pending the outcome of Allen's appeal (Tr 58-65) (R.57 and 61: Judgment and Commitment Order and Amended Judgment and Commitment Order). The current Amended Judgment continues to hold the sentence in abeyance (17a).

Allen timely appealed to the U.S. Court of Appeals for the Sixth Circuit (R.58: Notice of Appeal), which affirmed in a published opinion, *United States* v. *Allen*, 73 F.3d 64 (1995) (1a-10a). The Sixth Circuit panel found that

> Allen's efforts to avoid service of the trial subpoena constituted "disobedience or resistance" to the September 13, 1990 immunity order of Judge Gadola, which specifically required his testimony at a trial in regard to a conspiracy to defraud the IRS by Mr. LaRene and Mr. Giacalone.[3]

Id. 66 (6a). The panel thought it sufficient that Allen, knowing the government wanted to serve him with a subpoena, avoided service. *Id.* 66-67 (6a-7a). The panel focused on

> the entire background behind the order, including the conduct that the order was meant to enjoin or

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[3] In fact, the 1990 immunity order said nothing about a tax-fraud trial or who the defendants might be. The government's theory in 1990 was centered on extortion, not tax evasion. *See* footnote 1 and *Forman*, 71 F.3d at 1215.

> secure and the interest that the order was trying to protect.

Id. 671 (7a). By giving undue weight to what it thought the immunity order ***meant*** and insufficient weight to what it ***said***, the panel rewrote the order. It expanded the subsequent testimony provision, which is commonly included in grand jury immunity orders to reflect the permanent loss of the Fifth Amendment right against self-incrimination, and made the provision create a duty to appear at any trial whenever held without service of process:

> [T]he order was meant to enjoin defendant from refusing to appear at a trial regarding the IRS's conspiracy charge against LaRene and Giacalone. The interest the order was trying to protect was the ensurance of defendant's testimony at such a trial.

Id. (7a-8a). This expansion of what the immunity order actually said excused the government's failure to serve a trial subpoena by criminalizing Allen's conduct in avoiding the subpoena. *Id.*

Following its decision, the Sixth Circuit granted a stay of its mandate pending the filing of this petition.

REASONS FOR GRANTING THE WRIT

I. The federal criminal contempt statute, under canons of interpretation of criminal statutes applied by this Court since *United States* v. *Wiltberger*, is not violated by an individual named in an immunity order who, when a trial subpoena is issued years after the order, avoids service of the subpoena but does not attempt to assert a Fifth Amendment right not to testify.

The Sixth Circuit's result-oriented approach takes no account of the consequences of its holding. Its legal analysis creates criminal contempt liability where none existed before, since it permits the government to classify as contemnors persons who merely take a court order at face value and act in a fashion not foreclosed by the letter of the order, whenever the government can convince a court that the ***spirit*** of the order requires that it be read broadly to prohibit conduct it does not address.

If the Sixth Circuit's decision is not reviewed by this Court, either by granting certiorari or rendering a summary disposition on the merits under SUP. CT. R. 16.1, the only reported appellate authority on the precise question presented here will hold that grand jury immunity orders containing boilerplate references to possible future trial testimony will support criminal contempt prosecutions under 18 U.S.C. §401(3) whenever the government, even years later, is unable to serve a trial subpoena and can allege that the defendant knew of the subpoena. Immunity orders are not uncommon, and they commonly contain boilerplate language of the sort used here. But it would dangerously erode this Court's long-established canons of statutory construction to enlarge the scope of §401(3) liberally to encompass conduct that merely

has the same bottom-line effect as disobedience of an order, but that is not itself disobedient of the order.

Allen may have been chargeable with presumed knowledge that the 1990 immunity order required him to testify at any subsequent trial related to his grand jury testimony. But he did ***not*** know (since the immunity order said nothing about it) that the government had been relieved of its well-established Fed.R.Crim.P. 17 duty to serve him with a trial subpoena specifying the time and place of his testimony. Indeed, because he was free to travel as he wished without informing the government, he assumed that his duty to testify at a particular time and place could be triggered ***only*** by service of a trial subpoena.

It is easy to understand why the government took exception to this view of the 1990 immunity order (since it exposed the inadequacies of that order's language), but the government's failure to make Allen accountable for his whereabouts does not justify criminalizing his exercise of a citizen's freedom of movement without reporting to the government. And it is not understandable why the lower courts thought it proper to patch the holes in the government's order after-the-fact.

In a nutshell, the 1990 immunity order forbade Allen from refusing to testify, but not from evading service of process. What the Sixth Circuit has done here is superimpose its own apparent view that it is inherently wrong for an individual to construe an immunity order narrowly in his own favor and against the government. This led the Court to stretch §401(3) too far, so that behavior could be treated as criminally contumacious that displayed not contempt for a court order, but a desire to give the government no more cooperation than the order required.

This case is certworthy because the Sixth Circuit's conclusion that a citizen commits a felony merely by exercis-

ing rights (freedom of movement) not circumscribed in any way by a court order that limits other rights (self-incrimination), is a dangerous and unprecedented use of §401(3). The criminal contempt power, like other criminal statutes,[4] has been limited since the time of Justice Marshall by three overriding principles:

- The legislature, not the courts, defines criminal conduct;
- The rule of lenity requires that ambiguities be construed in favor of the defendant; and
- As a corollary, criminal statutes are strictly construed.

The Sixth Circuit itself, sitting *en banc*, has just stressed again the vitality of these three principles. *United States* v. *Lanier*, 73 F.3d 1380, 1389-1391 (6th Cir. 1996). (We will return to the *Lanier* case shortly.) The core concept, which this Court should be ever-vigilant to defend, was summarized by Justice Marshall in 1820:

> It would be dangerous, indeed, to carry the principle that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated.

United States v. *Wiltberger*, 18 U.S. 76, 96, 5 Wheat. 35, 5 L.Ed. 37 (1820). These words from 176 years ago appear in the same volume of opinions as Allen's case, 73 F.3d 1391, but the principle they announce was not applied to the charge against Allen.

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[4] "It is well established that criminal contempt, at least the sort enforced through nonsummary proceedings, is 'a crime in the ordinary sense'" and "a crime in every fundamental respect." *United States* v. *Dixon*, 509 U.S. 688, 125 L. Ed. 2d 556, 567-568, 570, 113 S. Ct. 2849 (1993).

From the government's point of view, Allen's evasion of service was equally atrocious and an act of kindred character with actually refusing to answer questions on the witness stand, but "[i]t would be dangerous, indeed," to treat the specificity requirement in criminal contempt law as though it were a game of horseshoes. The question is whether evasion of service is a willful refusal to obey this use immunity order, and the answer is clearly no. "No" because this 1990 order did nothing to relieve the government of its obligation to serve a trial subpoena on Allen in 1993, and that omission cannot be overlooked simply because evasion of service may have the same practical consequences as a refusal to testify.

Allen never failed to testify in any courtroom where his presence was required. This is no mere semantic quibbling, not when a felony conviction is at stake. The government, after scheduling the trial of Vito Giacalone and N.C. Deday LaRene for several dates without subpoenaing Allen, rescheduled it repeatedly again after issuing a subpoena. Because Allen was never served with that subpoena, he was never obligated to appear at any of those scheduled court proceedings. If he had been subpoenaed and nonetheless failed to testify, the government's right to prosecute him for criminal contempt would be undoubted, under either the trial subpoena or the 1990 immunity order. Just as plainly, however, Allen cannot be indicted for failing to testify at proceedings he was not required to attend.

A. The Sixth Circuit, by failing to give §401(3) the narrow and strict construction this Court has always required for criminal statutes, has created the new crime of evading service of process while subject to an immunity order.

This Court does not need to be reminded by Allen of its own long history of rigorously narrow interpretation of criminal statutes, particularly since that history was just summarized two months ago by the *en banc* Sixth Circuit. *Lanier*, 73 F.3d at 1389-1391. Allen adopts this discussion *en toto* and relies on the decisions of this Court analyzed by the Sixth Circuit, including: *Wiltberger*; *Bouie* v. *City of Columbia*, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964); *Connally* v. *General Construction Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926); *Crandon* v. *United States*, 494 U.S. 152, 158, 110 S.Ct. 997, 1002, 108 L.Ed.2d 132 (1990); *Commissioner* v. *Acker*, 361 U.S. 87, 91, 80 S. Ct. 144, 147, 4 L.Ed.2d 127 (1959); *Moskal* v. *United States*, 498 U.S. 103, 132, 111 S.Ct. 461, 477, 112 L.Ed.2d 449 (1990) ("The temptation to stretch the law to fit the evil is an ancient one, and it must be resisted.") (Scalia, J., dissenting).

The Sixth Circuit was unable to resist stretching §401(3) to fit the perceived evil Allen committed when he avoided being served with a trial subpoena in 1993. But Congress, whose "sole responsibility" it is to create new crimes, 73 F.3d at 1389, has not broadened Fed.R.Crim.P 17 (discussed *infra* at 17) to encompass contempt of ***unserved*** subpoenas. And avoiding service of the subpoena in 1993 did not constitute willful disobedience to the 1990 immunity order, which merely prevented Allen from asserting his Fifth Amendment rights and did not require him to cooperate with the government in any other way.

The Sixth Circuit recognized that it had to decide whether Allen's actions were "a *willful* attempt to avoid compliance with the immunity order" (5a). The willfullness requirement makes *Ratzlaf* v. *United States*, 510 U.S. __, 126 L.Ed.2d 615, 114 S.Ct. 655 (1994), closely analogous. *Ratzlaf* concerned the willfullness requirement of the federal law making it illegal to structure cash transactions to evade the requirement that financial institutions report cash transactions exceeding $10,000. This Court held that it was not enough to prove that an accused knew of the banks' reporting obligation and attempted to evade it—it must also be proven that the accused knew his structuring was unlawful.

Similarly, it would not be enough in the case at bar to prove that Allen knew he could not refuse to testify if served with a trial subpoena—it must also be proven that he knew it was unlawful for him to avoid the process server. But this cannot be proven because the 1990 immunity order did not put him on notice of any such illegality. Indeed, at least without a specific provision in the immunity order forbidding Allen from evading service, it was ***not*** unlawful for Allen to avoid the process server. This charge against Allen violates every canon of interpretation of criminal statutes announced by this Court, including the rule of lenity. *See Ratzlaf*, 126 L.Ed.2d at 627.

B. The Sixth Circuit failed to give §401(3) the same narrow and strict construction it required one week earlier in *United States* v. *Forman*.

A different panel of the Sixth Circuit properly applied §401(3) in *United States* v. *Forman*, 71 F.3d 1214 (6th Cir. 1995), a scant week before this case was decided. In *Forman* the court reversed the criminal contempt conviction of a Justice Department attorney who turned over to an associate

of Vito Giacalone secret grand jury materials—***including, ironically, Albert Allen's grand jury testimony***—based on a narrow reading of Fed.R.Crim.P. 6(e)(2), the rule the indictment accused the attorney of disobeying.

Rule 6(e)(2), then, is the analog for the immunity order in the case at bar. The *Forman* panel held that, even though Rule 6(e)(2) directly forbids "an attorney for the government" from disclosing grand jury matters, and even though Forman was such an attorney, the Rule 6(e)(2) phrase was globally defined in Fed.R.Crim.P. 54(c) to add the modifier "authorized," and this additional modifier did ***not*** apply to Forman because he had not been assigned to work on the Giacalone/-LaRene case in any official capacity. 71 F.3d at 1217-1220. Forman merely shared office space with another government lawyer who was working on the Giacalone/LaRene case.

The *Forman* panel's approach was correct. Without deciding the exact parameters of the term "authorized" in this context, it was enough to hold that the grand jury secrecy rule applied only to government lawyers who had been assigned "to work in some official capacity on the criminal proceeding." *Id.* 1220. "Consequently, the district court erred when it declined to dismiss the criminal contempt count of the indictment." *Id.*.

The reasoning of the *Allen* panel, on the other hand, would have led to the opposite (and incorrect) conclusion. The panel would simply have held that Forman willfully acted in a manner inconsistent with Rule 6(e)(2), deriving the meaning of the rule by focusing broadly on the conduct the rule enjoined and the interests the rule protected. The *Allen* panel would have no doubt that Forman's conduct showed contempt for the rule, and its broad view would have disregarded nice distinctions about the literal scope of the rule.

The core difference between these two approaches is what makes the *Allen* panel's error certworthy. Although the *Forman* panel abhorred the result it had to reach, 71 F.3d at 1220, it nonetheless reached that result because the rules of construction of criminal statutes required no less. But the *Allen* panel, by condoning the use of §401(3) to punish conduct not directly prohibited by the 1990 immunity order, opens the door for other courts to hold that it is a crime *even arguably* to "disobey" or "resist" an order, rule or command by acting in a fashion that may later be found not to measure up to a broadly inclusive reading of the order or rule.

C. The Sixth Circuit's focus on the "entire background" of the 1990 immunity order is at odds with the requirement that an order must specifically prohibit the conduct alleged to be contumacious.

Relying on language in *United States* v. *Greyhound Corp.*, 508 F.2d 529 (7th Cir. 1974), the Sixth Circuit focused on

> the entire background behind the order, including the conduct that the order was meant to enjoin or secure and the interest that the order was trying to protect.

73 F.3d at 671 (7a). This led the court to overlook the 1990 immunity order's silence concerning whether the government had to serve a trial subpoena to obtain Allen's testimony. But this ignored established principles well known to the Sixth Circuit:

> ***To warrant the imposition of criminal contempt sanctions, a party must willfully violate a specific, clear, and unequivocal court order.*** *See United States* v. *West*, 21 F.3d 607, 609 (5th Cir.

> 1994) (court order must be sufficiently definite or specific to support a contempt citation); *In re Holloway*, 995 F.2d 1080, 1099 (D.C. Cir. 1993), [*cert. denied*, ___ U.S. ___, 114 S.Ct. 1537, 128 L.Ed.2d 190 (1994)] (Mikva, C.J., dissenting) (observing that "before an individual may be punished for contempt for violating a court order, 'the terms of such order should be clear and specific, and leave no doubt or uncertainty in the minds of those to whom it is addressed'") (citing *In re Brown*, 454 F.2d 999, 1008 n.49 (D.C. Cir. 1971)) . . . ; *United States* v. *Robinson*, 922 F.2d 1531, 1534-35 (11th Cir. 1991) (to support a criminal contempt conviction, the government must prove that the defendant willfully violated "a lawful order of reasonable specificity").

Downey v. *Clauder*, 30 F.3d, 681, 686 (6th Cir. 1994) (emphasis added; citation corrected). In the present case, the Sixth Circuit paid lip-service to the "necessary specificity" rule (8a), but used *Greyhound* to circumvent it.

Properly understood, there is no conflict between *Downey*'s requirement that an order alleged to have been disobeyed must be "specific, clear, and unequivocal" and *Greyhound*'s instruction to look at the "entire background behind the order" to gather its meaning. The *Downey* requirement ***always*** applies, and *Greyhound* merely adds the gloss that courts should not put blinders on and look at court orders as though they were fully integrated contracts subject to the parol evidence rule. Of course a court order must be read in context, but that is no warrant for expanding it to forbid conduct it does not address.

In *Greyhound*, a dispute between bus companies dating back 27 years before the Seventh Circuit's decision, Grey-

hound Corporation was found to have willfully disobeyed an injunctive order entered by a three-judge district court following extensive proceedings before the Interstate Commerce Commission. 508 F.2d at 530-531. Five separate provisions (text at *id.* 531 n.4) in a lengthy order were at issue. It was, of course, necessary to read the provisions in the context of the extensive litigation that preceded them. The passage paraphrased by the Sixth Circuit (7a) and quoted at the outset of this section looked a little different in the *Greyhound* opinion:

> In a criminal contempt case involving a court order, ***such as the one before us***, on the other hand, the court should consider the entire background behind the order . . . .

Id. 532 (emphasis added). Clearly the *Greyhound* court was not announcing any principle inconsistent with the "necessary specificity" rule.

Judge Gadola might have included a no-avoidance-of-service clause to the immunity order in 1990 if the government had so requested, but *Greyhound* does not stand for the proposition that §401(3) permits such a clause to be read into the order after-the-fact because it would foster the interest (Allen's compelled testimony) the order meant to foster. Rather, criminal contempt under §401(3) requires willful disobedience or resistance to a specific, clear, and unequivocal court order.

The criminal contempt conviction in *Downey* was reversed for several reasons, including a lack of specificity in the order said to be disobeyed, but the Sixth Circuit did not question the specificity requirement in distinguishing *Downey*. Rather, the Court distinguished *Downey* on the basis of the absence of a willful, intentional violation in that case, as contrasted with Allen's intentional "avoidance of the trial subpoena" (9a). But it is worth stressing that Allen was not

indicted for contempt of the trial subpoena. Willful avoidance of the 1993 subpoena cannot simply be equated with willful disobedience of the 1990 immunity order.

D. The Sixth Circuit faults Allen's "attempt to tie the contempt indictment to the subpoena, as opposed to the immunity order," but cannot itself avoid relying on the unserved subpoena.

Allen's efforts to avoid service of the trial subpoena were not in contempt of that order because of Fed.R.Crim.P. 17(g):

> Contempt. *Failure by any person without adequate excuse to obey a subpoena* **served** *upon that person may be deemed in contempt of the court* from which the subpoena issued or of the court for the district in which it was issued if it was issued by a United States Magistrate Judge (emphasis added).

Because the subpoena was never served, a necessary precondition to contempt proceedings was absent. Indeed, this is the very reason that the government indicted Allen for contempt of the 1990 immunity order rather than proceeding under Fed.R.Crim.P. 17(g).

The government's theory, adopted by the lower courts, is that avoidance of the subpoena was merely "part of a plan to avoid complying with the immunity order" (8a). In light of this, the Sixth Circuit's reliance on *United States* v. *Rylander*, 714 F.2d 996 (9th Cir. 1983), *cert. denied*, 467 U.S. 1209, 104 S.Ct. 2398, 81 L.Ed.2d 355 (1984), is noteworthy. That case says that personal service of an order is not a prerequisite to contempt proceedings if the defendant has actual knowledge of the order. *Id.* 1003. This led the Sixth Circuit to conclude that:

> [E]ven though defendant was not personally served with the trial subpoena, the evidence indicates that

> defendant had actual knowledge of the subpoena and willfully avoided service of it. Knowledge or notice ***of a court order in question*** and a willful disobedience ***of that order*** are essential elements of criminal contempt.

73 F.3d at 67 (9a) (emphasis added).

It is extremely telling that the Sixth Circuit has confused the immunity order and the trial subpoena in this passage. In this passage the Court is saying that Allen can be held in contempt for disobeying the unserved trial subpoena because he had actual knowledge of it. This is wrong, of course, because Fed.R.Crim.P. 17(g) applies ***only*** to served subpoenas. The entire *Rylander* point is irrelevant to the immunity order itself, which ***was*** actually served on Allen. But the Sixth Circuit's inability to resist stressing Allen's knowledge of the subpoena's existence reveals the weakness of a contempt indictment based only on an immunity order that does not even approach the subject of how Allen's presence at possible future trials was to be obtained.

II. A petition for certiorari in a criminal case is not moot when the government asserts that the petitioner's estate is liable for $110,000 in costs and the authorized representative of the estate seeks to be substituted as a party under SUP. CT. R. 35.1; if this Court does not grant the substitution, it should grant certiorari to consider whether these circumstances constitute an exception to the Court's practice, since *Dove* v. *United States*, of dismissing certiorari petitions upon the petitioner's death.

A certiorari petition, containing only one issue and thought by counsel to be final, was sent from Michigan to the Cockle Printing Company in Nebraska on Friday, March 22,

1996. On that very day, Albert Allen died of complications from a stroke at the age of 69. Counsel of record in this Court learned of Mr. Allen's death on Sunday, March 24, by reading his obituary (51a). The deadline for filing this petition is March 27. This has required the contingent presentation of an issue that may or may not warrant review, depending on two events that will not occur until after (perhaps long after) Cockle Printing Company's deadline for receipt of the final petition text from counsel.

The first event, of course, is a final decision from the government on whether it will contend that the estate of Albert Allen is liable for the payment of $110,000 in costs assessed as part of Allen's sentence (19a). If the government does not so contend, it probably will be appropriate to withdraw the petition in its entirety. Otherwise, this petition is not moot in any sense and the authorized representative of Allen's estate should be permitted to pursue it.

The second event will be this Court's decision of the SUP. CT. R. 35.1 motion that accompanies this petition. If this Court permits the authorized representative of Allen's estate to be substituted as a party and does not dismiss the petition as moot under *Dove* v. *United States*, 423 U.S. 325, 46 L.Ed.2d 531, 96 S. Ct. 579 (1976), then the issue of the scope to be given *Dove* will not be presented in this case. On the other hand, if the Court denies the SUP. CT. R. 35.1 motion, it will be squarely presented with the question whether a *Dove*-type dismissal is inappropriate when the government is intent on collecting substantial costs or fines from the estate of the decedent petitioner.

The following discussion assumes that the government desires to collect money from Allen's estate but that this Court nonetheless does not grant the motion to substitute the authorized representative of Allen's estate as a party to this petition.

This Court said in *Durham* v. *United States*, 401 U.S. 481, 28 L.Ed.2d 200, 91 S. Ct. 858 (1971), *overruled by Dove*, that:

> [L]ower federal courts were unanimous on the rule to be applied: death pending direct review of a criminal conviction abates not only the appeal but also all proceedings had in the prosecution from its inception.

401 U.S. at 483, 28 L.Ed.2d at 203. In a footnote, this Court dismissed the argument that discretionary review should be treated differently from appeals of right:

> Since death will prevent any review on the merits, whether the situation is an appeal or certiorari, the distinction between the two would not seem to be important for present purposes.

Accordingly, this Court granted certiorari, vacated the judgment below and remanded with directions to dismiss the indictment. *Id.*

Five years later, in a short paragraph, this Court dismissed a petition for certiorari upon being advised of the petitioner's death, adding that "[t]o the extent that [*Durham*] may be inconsistent with this ruling, Durham is overruled." *Dove*, 423 U.S. at 325, 46 L.Ed.2d at 532.

Dove contains no analysis that would shed light on the precise extent to which it alters this Court's practice under *Durham*. A treatise often cited by this Court suggests that *Dove* may restore what it describes as a pre-*Durham* practice of "allowing the scope of the abatement and the viability of the indictment to be determined by the lower federal courts:"

> This cryptic overruling [in *Dove*] would seem to leave once again to the lower federal courts the question whether the abatement of the proceeding or the dismissal of the indictment is necessary or appropriate.

Stern, Gressman, Shapiro & Geller, SUPREME COURT PRACTICE §18.7 at 729 (7th ed. 1993). That relief may be satisfactory in a criminal case where the petitioner is aggrieved by the sentence primarily because of confinement terms that perforce become moot upon death. A very different situation is presented when the sentence assesses substantial monetary sanctions and the government is resolved to collect the money from the decedent's estate.[5]

In circumstances like those presented here, it is not enough to say that Allen's estate may be able to convince a lower court that abatement is appropriate if the petition for certiorari is dismissed. Any such lower-court motion would consider the effect of Allen's death against the backdrop of an affirmed conviction, but without reference to the merits of the first issue in this petition. Mr. Allen sought to obtain review of the first issue because he thought it was important and meritorious. Had he lived, he would have had the benefit of a favorable decision made by this Court. If this Court had reversed and directed that the indictment be dismissed, Allen would have been spared six months of home confinement (17a), but more significantly he would not have had to pay the government $110,000 (19a).[6]

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[5] It is not too late, of course, for the government simply to agree to dismiss the case in its entirety, making all further proceedings moot. Under SUP. CT. R. 46, "[c]ounsel for the decedent, or the personal representative, will be allowed to secure such a dismissal." SUPREME COURT PRACTICE at 729.

[6] The latest Amended Judgment refers to this $110,000 sum as a "fine" (19a). This is an error, since previous judgments deemed this sum to be "costs" (R.57, R.61) and the plea agreement did not permit a fine in so large an amount (28a). The $110,000 is sup-

(continued...)

That primary, pocketbook reason for wanting this Court to correct the lower courts' errors exists just as strongly now as it did before Mr. Allen died. There is no 'case or controversy' problem here, and no need to fear that representation of the petitioner's cause would be less thorough or spirited if certiorari were granted.

This Court's other post-*Dove* dismissals of petitions in criminal cases upon notice of a party's death, like *Dove* itself, contain no rationale that would warrant dismissal of the present petition. In *United States* v. *Green*, 507 U.S. __, 123 L.Ed.2d 260, 113 S. Ct. 1835 (1993), the accused was the respondent, not the petitioner. Upon his death, following a grant of certiorari and argument in this Court, dismissal of the petition left no conviction standing, much less a potential liability for the accused's estate.

In *Mintzes* v. *Buchanon*, 471 U.S. 154, 85 L.Ed.2d 120, 105 S. Ct. 2006 (1985), a habeas case, the criminal defendant, who had been convicted of two murders 25 years earlier, again was the respondent. This Court, in dismissing the petition after certiorari had been granted, merely cited *Warden* v. *Palermo*, 431 U.S. 911, 53 L.Ed.2d 221, 97 S. Ct. 2166 (1977), a four-line decision in another habeas case that relied on *Dove*. The judgment on review in *Mintzes* "ordered that respondent either be released or given a new hearing on the degree of his crimes and a resentencing." 471 U.S. at 154, 85 L.Ed.2d at 121 (Burger, C.J., dissenting). Nothing in the Court's per curiam opinion suggested that respondent's death did not render the certiorari issue entirely moot. The dissenting justice, agreeing that the case was moot, did speculate concerning the possible offensive use of collateral estoppel in

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[6](...continued)
posed to bear some relation to the expense incurred by the government in looking for Allen during 1993.

possible future civil litigation if the Sixth Circuit's judgment was not vacated, *id.* at 155-156, 85 L.Ed.2d at 122, but the speculation was for a different purpose and the factual circumstances in no way resemble the direct harm that the Estate of Albert Allen will suffer if it is denied all opportunity to advocate review in this Court of a $110,000 issue.

Justice Burger was advocating a limitation of *Dove* to cases on direct review, not habeas, *id.* at 157, 85 L.Ed.2d at 123, and perhaps also a distinction based on whether mootness occurs after certiorari has been granted, *id.* at 156-157, 85 L.Ed.2d at 123. But the dissent, like the majority, both were operating on the correct premise that respondent's interest in being either released or resentenced was a moot issue following his death. Just as clearly, there is nothing moot about the Estate of Albert Allen's interest in advocating all reasons at its disposal why it should not have to pay the government $110,000 in costs (19a).

The rationale underlying *Dove*-type dismissals is mootness, not the fact of death itself. When the case is not moot despite a party's death, substitution is just as appropriate in criminal cases as it is in any other case to which SUP. CT. R. 35 might be applied. If, nonetheless, substitution is not granted, the Court should create an exception to *Dove* for cases that are not rendered moot by death and give this petition the same review it would have received were Mr. Allen still alive.

CONCLUSION

For all the foregoing reasons, this Honorable Court should review the decision of the Sixth Circuit, either by granting certiorari or rendering a summary disposition on the merits under SUP. CT. R. 16.1, to ensure proper application of this Court's canons of interpretation of criminal statutes, to prevent the judicial creation of the crime of evasion of service

of process by persons subject to immunity orders, and to correct the injustice to Albert Allen of suffering a felony conviction merely because he did not want to testify against Vito Giacalone (a sentiment strongly shared by most of the population of Michigan) and did not think that he had any obligation to make himself available to a process server. In reaching that conclusion, Allen was right and the lower courts were wrong. This Court should remind the lower courts and government attorneys of the limits of the federal criminal contempt power by entering an order vacating Allen's conviction and sentence and dismissing the indictment.

For the reasons stated in the discussion of the second issue, if this Court does not grant the SUP. CT. R. 35 motion to substitute the authorized representative of Allen's estate as the petitioner in this Court, the Court should grant certiorari to consider whether the circumstances of this case present an exception to the Court's practice of dismissing certiorari petitions upon notice of the petitioner's death.

Respectfully submitted,

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March 27, 1995

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UNITED STATES of America,
Plaintiff-Appellee,

v.

Albert A. ALLEN, Defendant-Appellant.

No. 95-1244.

United States Court of Appeals,
Sixth Circuit.

Argued Nov. 8, 1995.

Decided Dec. 28, 1995.

Defendant was convicted in the United States District Court for the Eastern District of Michigan, Bernard A. Friedman, J., of criminal contempt, and he appealed. The Court of Appeals, Contie, Circuit Judge, held that defendant's efforts to avoid service of trial subpoena constituted "disobedience or resistance" to immunity order specifically requiring his testimony at criminal trial in regard to conspiracy to defraud Internal Revenue Service (IRS), and violated contempt statute.

Affirmed.

Keith Corbett (argued and briefed), Asst. U.S. Attorney, Patricia G. Blake, Office of the U.S. Attorney, Detroit, MI, for Plaintiff-Appellee.

Christopher A. Andreoff (briefed), David Griem, Jaffe, Raitt, Heuer & Weiss, Detroit, MI, Neil H. Fink (argued and briefed), Law Offices of Neil H. Fink, Birmingham, MI, for Defendant-Appellant.

Before: CONTIE, BATCHELDER, and MOORE, Circuit Judges.

CONTIE, Circuit Judge.

Defendant-appellant, Albert A. Allen, appeals his indictment for criminal contempt in violation of 18 U.S.C. § 401(3) and Fed.R.Crim.Pro. 42.

I.

On September 14, 1993, a federal grand jury sitting in the Eastern District of Michigan indicted defendant for criminal contempt in violation of 18 U.S.C. § 401(3) and Fed.R.Crim.P. 42. Defendant filed a motion to dismiss the indictment, alleging the indictment was defective because it did not properly charge a violation of 18 U.S.C. § 401(3). After a hearing, the district court struck from the indictment the charge of violation of Fed.R.Crim.P. 42, but denied defendant's motion to dismiss the indictment. On November 18, 1994, defendant entered a plea of guilty, reserving the right to appeal the district court's denial of his motion to dismiss the indictment.

The district court determined that the offense constituted a felony and on February 9, 1995, sentenced defendant to 180 days of home confinement and costs in the amount of $110,000. Defendant filed a timely notice of appeal on February 13, 1995. The imposition of sentence was held in abeyance pending the outcome of this appeal.

The indictment under which defendant was convicted read as follows:

> *Count 1*
> (18 U.S.C. § 401(3) – Criminal Contempt of Court)
> That commencing on or about April 20, 1993, and continuing up to the date of this indictment

> in the Eastern District of Michigan, Albert A. Allen, defendant herein, did attempt to avoid, and did avoid service of a trial subpoena in the case of *United States v. Vito Giacalone* and *N.C. Deday LaRene*, criminal number 92-80848. The refusal of Albert A. Allen, defendant herein, to make himself available for service of a subpoena is a willful refusal to obey a lawful order of the United States District Court, that is an immunity order dated September 13, 1990, signed by Honorable Paul V. Gadola, which requires Albert A. Allen to testify both before the grand jury and at any future trial. The refusal of Albert A. Allen, defendant herein, to comply with said order of the court is criminal contempt in violation of 18 U.S.C. § 401(3) and Rule 42, Federal Rules of Criminal Procedure.

The events which resulted in this indictment were as follows. On September 13, 1990, United States District Judge Paul Gadola issued an immunity order in the case *In re Grand Jury*, Misc. No. 90-1677, which required defendant Allen to testify before a special grand jury. This order declared that "Albert A. Allen will be called to testify before a special grand jury" and ordered "Albert A. Allen give testimony and provide other information which he is likely to refuse to give or provide on the basis of his privilege against self-incrimination, as to all matters and questions which he may be interrogated before said special grand jury and in *any trial* or other proceedings resulting therefrom as ancillary thereto." (emphasis added).

Defendant testified before a special grand jury five times. The investigation resulted in an indictment that charged Vito Giacalone and N.C. LaRene with conspiracy

to defraud the IRS and income tax evasion. The case was numbered Case No. 92-80848 and charged LaRene and Giacalone with a conspiracy to defraud the IRS by concealing the receipt of $420,000 from defendant Albert A. Allen. The indictment specified that Albert A. Allen gave the money to Mr. LaRene in cash in a series of 33 checks, which were made payable to cash, and were each drawn in amounts of less than $10,000.

A jury trial was scheduled for LaRene and Giacalone on July 14, 1993 after being postponed several times. On April 20, 1993, the United States issued a trial subpoena for defendant Albert A. Allen to appear as a witness in criminal case No. 92-80848. Previously, defendant's counsel and the United States' counsel had agreed that if defendant needed to be contacted for trial testimony, they would contact his attorney, Mr. David Griem, for the purpose of serving a subpoena on Griem for defendant's appearance. However, instead of accepting service, Mr. Griem advised the government agent that he would have to contact defendant himself to see if his client would agree to such an arrangement. For a period of six days thereafter, the government heard nothing from Mr. Griem.

On April 25, 1993, defendant's son was contacted by defendant and told by his father that defendant was going away for a while and "not to worry." On April 26, 1993, Mr. Griem contacted the United States agent and advised him that it would be necessary to contact defendant personally to subpoena him for trial. Although the United States tried to serve a subpoena on defendant Allen for many months, he was not available to receive the subpoena. It was only after LaRene and Giacalone

signed an agreement to plead guilty to the charges in case No. 92-80848 that defendant reappeared to face criminal charges for his avoidance of the subpoena.

II.

We must decide whether defendant's efforts to avoid being served with the trial subpoena in case No. 92-80848 constitutes contempt in violation of U.S.C. § 401(3) because it was a willful attempt to avoid compliance with the immunity order issued by Judge Gadola on September 13, 1990, ordering that defendant give testimony at any trial of LaRene and Giacalone.

The United States argues that defendant intentionally avoided service of the trial subpoena in case No. 92-80848 against LaRene and Giacalone as part of a plan to avoid complying with the immunity order issued by Judge Gadola on September 13, 1990, ordering that he testify at such a trial. The government argues that defendant was aware of his obligation to testify and was aware of the trial subpoena. The government argues that defendant knowingly and intentionally took steps to disobey and resist the immunity order issued by Judge Gadola on September 13, 1990, ordering him to testify at any trial, by resisting and willfully avoiding service of the trial subpoena. The government argues that this avoidance of the trial subpoena was clearly in contempt of Judge Gadola's immunity order of September 13, 1990.

Defendant argues that the immunity order was not sufficient to compel defendant's appearance at trial because if it were, there would have been no need to serve defendant with a trial subpoena. Defendant also

argues that the immunity order placed no restriction upon defendant's right to travel, nor did it require that defendant notify the government of his travel plans. Therefore, defendant concludes that the United States' failure to successfully serve him personally with a trial subpoena precludes a finding of contempt in regard to the underlying immunity order.

The contempt statute, 18 U.S.C. § 401, provides in relevant part:

> A court of the United States shall have the power to punish by fine or imprisonment, at its discretion, such contempt of its authority and none other, as . . . (3) disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

We find that defendant Allen's efforts to avoid service of the trial subpoena constituted "disobedience or resistance" to the September 13, 1990 immunity order of Judge Gadola, which specifically required his testimony at a trial in regard to a conspiracy to defraud the IRS by Mr. LaRene and Mr. Giacalone. Immediately after defendant's attorney was notified that the government wished to serve a subpoena ordering defendant's appearance at such a trial, defendant contacted his son and told him he had to go away for awhile and not to worry. He did not resurface until immediately after LaRene and Giacalone agreed to plead guilty to the charges in case No. 92-80848. We agree with the United States that the logical inference from these facts is that after Mr. Griem was notified about the subpoena, his knowledge of the existence of the trial subpoena was conveyed to the defendant. The evidence also indicates that defendant secreted himself somewhere

as evidenced by his statements to his son on April 25, 1993, indicating his plan to leave town without specifying his whereabouts. This occurred right after Mr. Griem had been informed about the subpoena. The logical inference is that after defendant learned about the subpoena, defendant decided to leave town. Furthermore, defendant's reappearance immediately after LaRene and Giacalone agreed to plead guilty gives further evidence of defendant's attempt to avoid participating as a witness in the trial of case No. 92-80848, which had been scheduled before the guilty plea was reached. We find that these facts indicate that defendant was aware that the government had a trial subpoena which would obligate him to appear at the trial of LaRene and Giacalone, and that he knowingly attempted to disobey and resist the immunity order of September 13, 1990, indicating he had to testify at such a trial, by avoiding service of the trial subpoena. Defendant's actions indicate a clear effort to engage in conduct which the immunity order sought to enjoin – refusal to testify.

This case is similar to *United States v. Greyhound Corp.*, 508 F.2d 529 (7th Cir. 1974). In *Greyhound Corp.*, the court stated that in a criminal contempt case involving a court order, the court should consider the entire background behind the order, including the conduct that the order was meant to enjoin or secure and the interest that the order was trying to protect. *Id.* at 532. In the present case, the entire background behind Judge Gadola's order indicates that the order was meant to enjoin defendant from refusing to appear at a trial regarding the IRS's conspiracy charge against LaRene and Giacalone. The interest the order was trying to protect was the ensurance

of defendant's testimony at such a trial. The court in *Greyhound Corp.* also indicated that the order had to be examined to see if it was sufficiently specific to indicate whether a defendant knew or should have known his conduct was unlawful. *Id.* We believe that in the present case Judge Gadola's immunity order was sufficiently specific in stipulating that defendant had to attend *any trial* regarding LaRene and Giacalone's conspiracy to defraud the IRS, and defendant knew or should have known that his conduct in avoiding a subpoena requesting his presence at such a trial was unlawful.

Defendant argues that the words "any trial" in the immunity order lacked the necessary specificity. Defendant argues that the subpoena to appear at the trial was never served on him and since a subpoena must state the time and place of testimony, the immunity order is not specific enough to serve as a basis for holding defendant in contempt. We find that defendant's attempt to tie the contempt indictment to the subpoena, as opposed to the immunity order, must fail. By avoiding the subpoena, defendant engaged in conduct which was part of a plan to avoid complying with the immunity order of September 13, 1990 and to resist testifying at the trial of LaRene and Giacalone, which the immunity order demanded, and therefore constitutes a violation of 18 U.S.C. § 401(3).

This case is also similar to *United States v. Rylander*, 714 F.2d 996 (9th Cir. 1983), *cert. denied*, 467 U.S. 1209, 104 S.Ct. 2398, 81 L.Ed.2d 355 (1984), which involved the defendant's disobedience of an order to appear at a show cause hearing. Defendant Rylander asserted that he could not be held in contempt of the order, ordering him to appear at a show cause hearing, because he was not

personally served with the order. The *Rylander* court held that contrary to defendant Rylander's assertion that he could not be held in contempt because he was not actually personally served with the order, actual knowledge of the order is all that is required, not service. *Id.* at 1003. Thus, neither final notice nor personal service is necessary to support a conviction for criminal contempt. In the present case, even though defendant was not personally served with the trial subpoena, the evidence indicates that defendant had actual knowledge of the subpoena and willfully avoided service of it. Knowledge or notice of a court order in question and a willful disobedience of that order are essential elements of criminal contempt. *United States v. Powers*, 629 F.2d 619, 627 (9th Cir. 1980). The evidence in the present case indicates that defendant Allen had knowledge of his need to appear at trial and attempted to disobey and resist the immunity order by avoiding service of the trial subpoena so he would not have to attend trial.

The case on which defendant relies, *Downey v. Clauder*, 30 F.3d 681 (6th Cir. 1994), in which the defendant was not found to have committed criminal contempt, is clearly distinguishable from the present case. In *Downey*, the court stated that there was no evidence that the defendant had acted with the willfulness that implies a deliberate or intentional violation, as distinguished from an accidental, inadvertent, or negligent violation. *Id.* at 686. In contrast, in the present case, the evidence indicates that defendant's avoidance of the trial subpoena was not accidental, inadvertent, or negligent. By avoiding the trial subpoena, defendant was willfully violating the immunity order of Judge Gadola. In the present case, the

record makes clear that defendant willfully disobeyed a specific order and hence is guilty of contempt. Moreover, in his guilty plea, defendant acknowledged that he attempted to avoid service of the subpoena. According to *Rylander*, 714 F.2d at 1003, actual knowledge of an order supports contempt, despite lack of personal service.

To conclude, defendant Allen, knowing the existence of the subpoena and knowing that he was obligated by the immunity order of September 13, 1990 to testify at the trial to which he was subpoenaed, clearly acted with an intent to disobey the immunity order by secreting himself to avoid service of the subpoena and thus committed an act of criminal contempt in violation of 18 U.S.C. § 401(3). The district court is hereby ***AFFIRMED***.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALBERT A. ALLEN,

Defendant.
_____/

Criminal Action No. 93-CR-80949-DT
HON. BERNARD A. FRIEDMAN

ORDER

(Filed May 5, 1994)

On April 28, 1994, this matter came before the court on all pending motions. A hearing was held and oral argument heard. For the reasons stated on the record,

IT IS ORDERED that defendant's motion to dismiss the indictment and request for an evidentiary hearing is denied.

IT IS FURTHER ORDERED that defendant's motion for a bill of particulars and request for evidentiary hearing is denied.

IT IS FURTHER ORDERED that defendant's motion for disclosure of electronic surveillance is denied, except as to certain telephone records, which are to be produced.

IT IS FURTHER ORDERED that defendant's motion to file additional motions is denied as moot.

IT IS ORDERED that defendant's motion for production of grand jury transcripts and for pretrial disclosure of Jencks Act material is granted in part and denied in

part as follows: grand jury transcripts are to be produced to the extent and under the conditions discussed at the hearing; the motion for pretrial disclosure of Jencks Act material is denied.

IT IS FURTHER ORDERED that defendant's motion for discovery and disclosure of exculpatory evidence is denied as moot.

IT IS FURTHER ORDERED that defendant's motion for discovery and disclosure of specified items is denied.

IT IS FURTHER ORDERED that defendant's motion for disclosure of all statements which the government will seek to attribute to defendant is denied.

/s/ Bernard A. Friedman
BERNARD A. FRIEDMAN
UNITED STATES
DISTRICT JUDGE

Dated: MAY 5 1994
Detroit, Michigan

copies to:

Keith Corbett, Esq.
David Griem, Esq.
Christopher A. Andreoff, Esq.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALBERT A. ALLEN,

Defendant.
_____/

Criminal Action
No. 93-80949

HON. BERNARD
A. FRIEDMAN

ORDER DENYING DEFENDANT'S MOTION TO DISMISS THE INDICTMENT

(Filed Nov. 21, 1994)

This matter is before the court on defendant's motion to dismiss the indictment, filed November 18, 1994. For the reasons stated on the record,

IT IS HEREBY ORDERED that defendant's motion to dismiss the indictment is denied.

/s/ Bernard A. Friedman
BERNARD A. FRIEDMAN
UNITED STATES
DISTRICT JUDGE

Dated: NOV 21 1994
Detroit, Michigan

UNITED STATES DISTRICT COURT
Eastern District of Michigan

UNITED STATES
OF AMERICA

v.

ALBERT A. ALLEN
Defendant.

Case Number CR **93-80949-1**
Honorable Bernard A. Friedman

AMENDED JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, **ALBERT A. ALLEN,** was represented by **NEIL FINK/CHRISTOPHER A. ANDREOFF.**

The defendant pleaded guilty to Count(s) **1.** Accordingly, the defendant is adjudged guilty of such count(s), involving the following offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18:401(3)	**CRIMINAL CONTEMPT OF COURT**	**4/93**	**1**

As pronounced on **2/9/95,** the defendant is sentenced as provided in pages 2 through 5 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of **$ 50.00,** for Count(s) **1,** which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed: FEB 28 1996

/s/ Bernard Friedman
Bernard A. Friedman
United States
District Judge

Defendant's SSN: **356-14-9067**
Defendant's Date of Birth: **12/26/26**
Defendant's address: **32802 BARCLA SQUARE, WARREN, MI 48093**

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 1 day, credit for time served.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

Defendant delivered on _ to _ at _, with a certified copy of this Judgment.

United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 1 years.

While on supervised release, the defendant shall not commit another federal, state, or local crime; shall not illegally possess a controlled substance; shall comply with the standard conditions that have been adopted by this court (set forth below); and shall comply with the following additional conditions;

– If ordered to the custody of the Bureau of Prisons, the defendant shall report in person to the probation office in which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

– If this judgment imposes a fine, special assessment, costs, or restitution obligation, it shall be a condition of supervised release that the defendant pay, as directed by the Probation Office, any such fine, assessments, costs, and restitution that remain unpaid at the commencement of the term of supervised release.

– The defendant shall not own or possess a firearm, destructive device, or dangerous weapon.

– The defendant shall participate in the Home Confinement Program for a period of 180 consecutive days. During this time, you will remain at your place of residence except for employment and other activities approved in advance by your probation officer. You will maintain a telephone at your place of residence without "Call Forwarding," a Modem, "Caller ID," "Call Waiting," or "Portable Cordless Telephones" for the above period.

The Court Orders that the defendant not be placed on a tether.

Imposition of sentence is held in abeyance pending the disposition of defendant's appeal.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

1) The defendant shall not leave the judicial district without the permission of the court or probation officer.

2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.

3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

4) The defendant shall support his or her dependents and meet other family responsibilities.

5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.

6) The defendant shall notify the probation officer at least 10 days prior to any change in residence or employment.

7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances.

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.

11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the

probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

FINE

The defendant shall pay a fine of $ 110,000.00, immediately.

STATEMENT OF REASONS

The court adopts the factual findings and guideline application in the presentence report

Guideline Range Determined by the Court:

Total Offense Level:	7
Criminal History Category:	I
Imprisonment Range:	0 months to 6 months
Supervised Release Range:	Court's discretion
Fine Range:	$ 500. to $ 5,000.
Restitution:	N/A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

ALBERT A. ALLEN,

Defendant.
_____/

CRIMINAL NO. 93-80949

VIOLATION: 18 U.S.C. § 401

INDICTMENT

(Filed Sep. 14, 1993)

THE GRAND JURY CHARGES:

COUNT ONE

(18 U.S.C. § 401(3) – Criminal Contempt of Court)

That commencing on or about April 20, 1993, and continuing up to the date of this indictment in the Eastern District of Michigan, ALBERT A. ALLEN, defendant herein, did attempt to avoid, and did avoid service of a trial subpoena in the case of *United States v. Vito Giacalone and N.C. Dedav LaRene*, Criminal No. 92-80848. The refusal of ALBERT A. ALLEN, defendant herein, to make himself available for service of a subpoena is a willful refusal to obey a lawful order of the United States District Court, that is an immunity order dated September 13, 1990, signed by Honorable Paul V. Gadola, which requires ALBERT A. ALLEN to testify both before the grand jury and at any future trial. The refusal of ALBERT A. ALLEN, defendant herein, to comply with said order of the court

is criminal contempt in violation of 18 U.S.C. § 401(3) and Rule 42, Federal Rules of Criminal Procedure.

THIS IS A TRUE BILL.

/s/ Illegible
FOREPERSON

ALAN M. GERSHEL
United States Attorney
Eastern District of Michigan

/s/ Keith E. Corbett
KEITH E. CORBETT
Assistant Chief, Criminal Division

Dated: 9/14/93

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

ALBERT A. ALLEN,

Defendant.

Case No. 93-80949

Honorable Bernard Friedman

_____ /

Keith Corbett P24602
Assistant U.S. Attorney

David Griem P23187
Attorney for Defendant

Christopher A. Andreoff P10193
Co-counsel for Defendant

_____ /

MOTION TO DISMISS THE INDICTMENT AND REQUEST FOR AN EVIDENTIARY HEARING

NOW COMES Defendant, by and through his counsel of record, who move this Honorable Court to dismiss the Indictment for the following reasons:

1. According to the Indictment, Defendant is charged with criminal contempt in violation of 18 U.S.C. 401(3).

2. The Indictment specifies that on September 13, 1990, United States District Judge Paul Gadola issued an Immunity Order in Misc. No. 90-1677 which required that the Defendant, Albert Allen, be called to testify before a

"Special Grand Jury," and that he be granted use immunity "in all matters and questions which he may be interrogated before said Special Grand Jury and in any trial." (A copy of the Order is appended an [sic] Exhibit A.)

3. Thereafter, Defendant was taken before the Special Grand Jury on five separate occasions and testified pursuant to the use immunity order.

4. In 1992, Messrs. Vito Giacalone and N.C. Deday LaRene were indicted in Criminal No. 92-80848 (E.D. Mich).

5. In 1993, the United States District Court set a trial date for June 1993, in *United States v. Giacalone/LaRene, supra.*

6. Prior to the June 1993 trial date, Defendant could not be located for the alleged purpose of being subpoenaed for the above trial. At no time did the government or its agents personally notify the Defendant or serve a trial subpoena on him.

7. Pursuant to Rule 17(a)(d) of the Federal Rules of Criminal Procedure, a trial subpoena for a witness shall be issued by the clerk under the seal of the court, shall command each person to whom it is directed to attend and give testimony at the time and place specified therein, and may be served by the Marshal or Deputy Marshal. Failure by any person without adequate excuse to obey a subpoena *served* upon that person may be deemed a contempt of the court which the subpoena issued, Fed.R. Crim. Pro. 17(g).

8. The essential elements of criminal contempt are that a court entered a lawful order of reasonable specificity, the contemnor knew of the order and violated it,

and the violation was wilful. See *United States v. Turner*, 812 F.2d 1552, 1563 (11th Cir. 1987) and *United States v. Rylander*, 714 F.2d 996, 1001 (9th Cir. 1983).

9. At no time was Defendant personally served with a trial subpoena, nor is there any evidence that he had knowledge of a specific order compelling his attendance at a trial.

10. Based upon the legal nature of the pending offense, and its impact on any trial, a pretrial evidentiary hearing is necessary to determine if the government has charged a viable federal offense.

11. Pursuant to Rule 12(b)(1)(2) of the Federal Rules of Criminal Procedure, and the applicable case law, this Court has both the discretion and the authority to conduct a pre-trial hearing, and to dismiss the Indictment.

12. Counsel for the government objects to the relief as requested in this Motion.

WHEREFORE, Defendant requests that a pretrial evidentiary hearing be conducted, and that the Indictment be dismissed.

Respectfully submitted,

/s/ Christopher A. Andreoff
Christopher A. Andreoff P10193
Attorney for Defendant
607 Shelby Street, Suite 400
Detroit, Michigan 48226
(313) 965-4900

Dated: March 2, 1994

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

ALBERT A. ALLEN,

Defendant.
_____/

CRIMINAL NO. 93-80949

HONORABLE BERNARD A. FRIEDMAN

GOVERNMENT'S ANSWER TO DEFENDANT'S MOTION TO DISMISS THE INDICTMENT AND REQUEST FOR AN EVIDENTIARY HEARING

(Filed Apr. 22, 1994)

NOW COMES the United States of America by and through its attorneys, Saul A. Green, United States Attorney, and Keith E. Corbett, Assistant United States Attorney, both for the Eastern District of Michigan, in opposition to Defendant's Motion to Dismiss the Indictment and Request for an Evidentiary Hearing, and says to this Honorable Court that:

1. The government admits the allegation in paragraph one (1).

2. The government admits the allegation in paragraph two (2).

3. The government admits the allegation in paragraph three (3).

4. The government admits the allegation in paragraph four (4).

5. The government admits the allegation in paragraph five (5).

6. The government neither admits nor denies the allegation in paragraph six (6).

7. The government neither admits nor denies the allegation in paragraph seven (7).

8. The government admits the allegation in paragraph eight (8).

9. The government denies the allegation in paragraph nine (9).

10. The government denies the allegation in paragraph ten (10).

11. The government admits the allegation in paragraph eleven (11).

12. The government admits the allegation in paragraph twelve (12).

WHEREFORE, the government respectfully requests that this Honorable Court deny the Motion to Dismiss the Indictment and Request For an Evidentiary Hearing for the reasons detailed in the Government's Memorandum in Opposition.

Respectfully submitted,

SAUL A. GREEN
United States Attorney

/s/ Keith E. Corbett
KEITH E. CORBETT (P24602)
Assistant United States Attorney
817 Federal Building
231 W. Lafayette
Detroit, Michigan 48226
Telephone: (313) 226-7252

Dated: April 22, 1994

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff,	CRIMINAL NO. 93-80949
	HONORABLE BERNARD FRIEDMAN
vs.	VIOLATION(S): 18 USC 401(3)
ALBERT A. ALLEN, Defendant.	OFFENSE(S): CRIMINAL CONTEMPT
	STATUTORY MAXIMUM INCARCERATION: LIMITED BY EIGHT [sic] AMENDMENT
	STATUTORY MINIMUM INCARCERATION: PROBATION
	STATUTORY MAXIMUM FINE: TO BE DETERMINED WHEN THE COURT DETERMINES IF THIS IS A FELONY OR MISDEMEANOR
_____/	

RULE 11 PLEA AGREEMENT

Pursuant to Rule 11 of the Federal Rules of Criminal Procedure, the defendant, the attorney for the defendant, and the government[1] agree as follows:

---

[1] The word "government" in this agreement refers to the United States Attorney for the Eastern District of Michigan.

1. Guilty Plea.

The Defendant shall enter a plea of guilty to count(s) 1 of the indictment.

* * *

I.

The government further agrees that the defendant retains the right to appeal the court's refusal to grant his motion to dismiss the indictment pursuant to Federal Rules of Criminal Procedure 12 in accordance with the provisions of Federal Rules of Criminal Procedure 11(a)(2).

Moreover, a fine if imposed by the court shall not exceed $25,000.00.

* * *

B. Acceptance.

This plea offer is explicitly conditioned on receipt by the Office of the United States Attorney of this fully signed plea agreement no later than 5:00 P.M. on Friday, November 18, 1994. It is defendant's sole and complete responsibility to provide timely delivery of this signed agreement by the date specified above in order for this offer to be effectively accepted.

SAUL A. GREEN
United States Attorney

Dated: 11/18/94

/s/ Keith E. Corbett
KEITH E. CORBETT
Assistant U.S. Attorney
817 Federal Building
231 W. Lafayette Street
Detroit, MI 48226

Dated: 11/18/94

/s/ Albert A. Allen
ALBERT A. ALLEN
Defendant

Dated: 11/18/94

/s/ Neil H. Fink
NEIL H. FINK
Attorney for Defendant
185 Oakland Avenue, #250
Birmingham, MI 48009

Dated: 11/18/94

/s/ Christopher A. Andreoff
CHRISTOPHER A. ANDREOFF
Attorney for Defendant
1 Woodward Avenue
Suite 2400
Detroit, MI 48226

[p. 35] Detroit, Michigan
Friday, November 18, 1994
11:00 o'clock a.m.

* * *

THE CLERK: Case 93-CR-80949, *United States of America versus Albert A. Allen.*

THE COURT: Okay. Both sides ready? Appearances, please.

MR. ANDREOFF: Where would you want us, up here or back there?

THE COURT: Wherever.

MR. ANDREOFF: Chris Andreoff appearing on behalf of defendant.

MR. FINK: Neil Fink appearing on behalf of defendant also.

MR. CORBETT: Keith Corbett appearing on behalf of the government, Your Honor.

* * *

[p. 43] THE COURT: It's my understanding the government's going to give an offer of proof in this particular matter, so I'm going to ask him to do so. They're going to indicate what they believe they could [p. 44] prove. I'll ask you to listen, to see if you are going to confirm that, and if that's what they could do, and if that's what you're pleading guilty to, okay?

MR. ALLEN: Yes.

MR. CORBETT: Government would indicate in approximately September – would produce evidence to indicate in approximately September of 1990 the defendant, Mr. Allen, was served with a court order immunity, signed by the Honorable Paul Gadola, which order of immunity obligated the defendant to testify at a grand jury proceeding and any subsequent trial or ancillary proceeding.

The government would, further, produce evidence that during the course of several – at least on one occasion during the course of the defendant's appearance in the grand jury, he was specifically advised by counsel of the obligation imposed by that immunity order for him to testify at trial if necessary;

That in approximately April the 20th of 1993, the government had issued a subpoena for Mr. Allen for a trial date before Judge – before Judge Duggan, on June 14th, 1993;

That in connection with this, as per previous agreement, the government attempted to contact counsel representing Mr. Allen, Mr. David Grimm, to advise Mr. [p. 45] Grimm that there was a subpoena outstanding for his client Mr. Allen, and to ask him if he would accept service of said subpoena.

Mr. Grimm advised Agent Soretowski (phonetic) of the criminal investigation division of the IRS that he would have to contact his client.

On the 26th of April, some six days later, Mr. Grimm had a telephone conversation with Special Agent Soretowski, wherein he advised the agent it would be necessary for him to contact Mr. Allen himself for the purpose of executing the subpoena.

The government would further offer testimony that on September – on April 25th, one day before Mr. Grimm's notification, Mr. Allen met with his son and advised his son he would be going away and would be away for an extended period of time, and not to worry about him;

That from April 26th until the day that Mr. Allen surrendered himself he was not in the area.

The government made numerous efforts from contacting his family to attempting to locate him over a period of many months.

It was not until November of 1993, after the defendant had signed a Rule 11 agreement with the government obviating the necessity to testify, and in fact [p. 46] on the day the matter was set to take a plea – though it did not take place that day – Mr. Allen, with his attorney Mr. Grimm, surrendered himself.

I would also indicate that in approximately May of 1993, a material witness warrant was issued for the defendant, and the government made efforts to locate him up to the time he surrendered himself.

THE COURT: Mr. Fink?

MR. FINK: Yes. I think the defendant is willing to say the government would offer proofs to that affect during the course of trial. And a trier of fact, if they chose

to believe those proofs, could find those facts. Much of the indictment is couched in the language that goes to the Rule 12 motion.

THE COURT: At least as to those things that are alleged by your client, other than the editorializing the government did, obviously doesn't know what the government did or didn't do. Is he willing to plead to those?

MR. FINK: He's willing to accept those facts could be demonstrated at trial and a jury could accept them and he could be found guilty.

* * *

[p. 47] MR. CORBETT: Your Honor, I believe it was my understanding Mr. Allen might be willing to indicate he did attempt to avoid service of the subpoena.

THE COURT: Is that correct, Mr. Allen; you did attempt to avoid service?

MR. ALLEN: Yes.

THE COURT: And you have heard what Mr. Fink has just indicated and you confirm that, is that correct?

MR. ALLEN: Yes, sir.

* * *

[p. 50] Detroit, Michigan
Thursday, February 9, 1995
2:00 o'clock p.m.

* * *

THE CLERK: Calling case number 93-80949, *United States of America versus Albert Allen.*

THE COURT: May we have appearances, please.

MR. CORBETT: Your Honor, Keith Corbett, appearing on behalf of the United States.

MR. FINK: Neil Fink and Christopher Andreoff on behalf of Mr. Allen.

Your Honor, may the record reflect Mr. Allen is present in court and with us?

* * *

[p. 62] MR. ANDREOFF: Regarding the record, so the record is clear. On or about March 2nd, 1994, I filed a motion to dismiss the indictment based upon those grounds as raised in the motion regarding the institution of the proceedings based upon the contempt of the indictment. The government followed with a response. We had oral argument and, subsequently, this Court entered an order on or about – or prior to November 21st, 1994 denying my motion, which was a Rule 12 motion.

As I indicated previously at the time of the [p. 63] taking of the plea – and I don't get shortcut by the U.S. Court of Appeals for the 6th Circuit – my understanding – and I believe Mr. Corbett will agree and stipulate for

purposes of the record – the facts as outlined in both my motion, his response and our oral arguments, were and are the facts as related to this particular matter relative to any appeal that will be taken to the Court of Appeals. So I don't want an issue to be raised in a pleading that there are other issues or other facts that could have been raised during the course of time. So that's what I'm raising at this particular point, so the record is clear, and it's final in that regard.

THE COURT: Mr. Corbett, is that your understanding?

MR. CORBETT: Yes. And I know no one – Mr. Andreoff expressed somewhat what the Court of Appeals would do. I would indicate for myself, I'm quite content to deal with the plea we have and I assume Mr. Andreoff is as well.

THE COURT: And you agree those are the facts contained in those documents?

MR. CORBETT: Yes.

* * *

[p. 65] CERTIFICATE OF REPORTER

STATE OF MICHIGAN)
)
COUNTY OF WAYNE)

I hereby certify I stenographically reported the proceedings had and testimony taken in the above-entitled matter on the date and at the time hereinbefore set forth,

that my Stenographic notes were later reduced to typewritten form by means of Computer-assisted Transcription, and that the foregoing transcript is a true and accurate transcription of my Stenograph notes of the matter there and then reported.

FREDERICK C. PRATT, CSR-2301
Official Court Reporter
U.S. District Court, Eastern
District of Michigan,
Southern Division.

Dated: Detroit, Michigan
April 13, 1995

EXHIBIT A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE: GRAND JURY PROCEEDING / MISCELLANEOUS NO. 90-1677

ORDER

On motion of Stephen J. Markman, United States Attorney for the Eastern District of Michigan, and David E. Morris, Assistant United States Attorney, United States Department of Justice, filed in this matter, and it appearing to the satisfaction of the court that:

1. Albert Allen will be called to testify and provide other information before a Special Grand Jury of the United States presently empaneled and hearing testimony and evidence within the Eastern District of Michigan; and

2. In the judgment of the attorneys for the government Albert Allen is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination; and

3. In the judgment of the attorneys for the government, the testimony or other information from Albert Allen may be necessary to the public interest; and

4. The aforesaid motion filed herein has been made with the approval of Paul L. Maloney, Deputy Assistant Attorney General, of the Criminal Division of the United States Department of Justice, pursuant to the authority vested in him by Title 18, United States Code, Section

6003(b) and Title 28, Code of Federal Regulations, Section 0.175(a);

NOW, THEREFORE, IT IS HEREBY ORDERED pursuant to Title 18, United States Code, Sections 6002-6003, that Albert Allen give testimony and provide other information which he is likely to refuse to give or provide on the basis of his privilege against self-incrimination, as to all matters and questions which he may be interrogated before said Special Grand Jury and in any trial or other further proceedings resulting therefrom or ancillary thereto.

No testimony or other information compelled under this order, or any information directly or indirectly derived from any such testimony or other information, may be used against Albert Allen in any criminal case or to subject Albert Allen to any penalty or forfeiture, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with this order.

/s/ PAUL V. GADOLA
UNITED STATES
DISTRICT JUDGE

DATED: SEP 13 1990

A TRUE COPY

By /s/ Illegible

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

SUBPOENA
IN A CRIMINAL CASE

CASE NO. 92-80848
JUDGE PATRICK J. DUGGAN

Plaintiff		Defendant
UNITED STATES OF AMERICA	V	VITO GIACALONE, N.C. DEDAY LaRENE.

TO: ALBERT ALLEN

COMMAND TO APPEAR

YOU ARE HEREBY COMMANDED to appear in the United States District Court for the Eastern District of Michigan at the place, date and time specified below to testify in the above case.

Court:

Honorable Patrick J. Duggan
231 W. Lafayette
Detroit, Michigan 48226

[X] APPEARANCE ONLY
[ ] APPEARANCE WITH DOCUMENTS (see description below)

Courtroom 237
Date and Time
June 14, 1993 9:00 a.m.

Description of documents or objects:

JOHN P. MAYER, CLERK OF THE COURT

Deputy Clerk Illegible

Date of Issuance:

April 20, 1993

Attorney's name, address and telephone number:

KEITH E. CORBETT
817 Federal Building
Detroit, Michigan 48226
(313) 226-7252

Docket as of August 6, 1994 6:07 pm

Proceedings include all events. TAC CLOSED
:92cr80848-1 USA v. Giacalone, et al

TAC CLOSED

U.S. District Court
for the Eastern District of Michigan (Detroit)

CRIMINAL DOCKET FOR CASE #: 92-CR-80848-1

Filed: 09/16/92

USA v. Giacalone, et al
Case Assigned to: Judge Patrick J. Duggan
Dkt# in other court: None

VITO GIACALONE
aka
Billy"
defendant
[term 05/23/94]

David F. DuMouchel
[term 05/23/94
[COR LD NTC ret]
Butzel Long
150 W. Jefferson
Suite 900
Detroit, MI 48226-4430
313-225-7000
FTS 225-7080

Pending Counts:	Disposition
8:371 CONSPIRACY (1)	THE DEFENDANT IS COMMITTED TO THE CUSTODY OF THE ATTORNEY GENERAL FOR A PERIOD OF (3) YEARS. (1)

Offense Level (opening): 4

Terminated Counts:	Disposition
26:7201 EVASION OF THE PAYMENT OF INCOME TAX (2)	COUNTS 2 & 3 DISPOSED OF WHEN ENTERING JUDGMENT (2)
26:7201 and 18:2 EVASION OF INCOME TAX; AIDING AND ABETTING (3)	COUNTS 2 & 3 DISPOSED OF WHEN ENTERING JUDGMENT (3)

Offense Level (disposition): 4

Complaints:

NONE

9/16/92	–	Magistrate Thomas A. Carlson (1080) [Entry date 09/16/92]
9/16/92	1	INDICTMENT against Vito Giacalone (1) count(s) 1, 2, 3 (1074) [Entry date 09/16/92]
9/25/92	–	INITIAL appearance by defendant Vito Giacalone (1) count(s) 1, 2, 3 before Magistrate Paul J. Komives, set unsecured bond in the amount of $50,000 as to defendant Vito Giacalone with conditions – D/Atty: David DuMouchel – AUSA: Keith Corbett – Tape # Duty Call 9/25/92 (1063) [Entry date 09/25/92]
9/25/92	–	ARRAIGNMENT held as to defendant Vito Giacalone, plea of not guilty entered – Magistrate Paul J. Komives – D/Atty: David DuMouchel – AUSA: Keith Corbett – Tape #: Duty Call 9/25/92 (1063) [Entry date 09/25/92]

9/25/92	–	SCHEDULE: by Magistrate Paul J. Komives pretrial conference set for 9:30 9/29/92 for Vito Giacalone (1063) [Entry date 9/25/92]

* * *

9/29/92	–	PRETRIAL conference held as to defendant Vito Giacalone – Magistrate Judge Steven D. Pepe (1077) [Entry date 10/01/92]
10/1/92	11	NOTICE of criminal jury trial (1074) [Entry date 10/02/92]
10/1/92	–	SCHEDULE: by Judge Patrick J. Duggan criminal jury trial set for 8:45 11/16/92 for Vito Giacalone, for N.C. Deday LaRene (1164) [Entry date 10/06/92]
10/13/92	14	PRETRIAL conference summary order by Judge Patrick J. Duggan as to defendant Vito Giacalone (1074) [Entry date 10/14/92]
10/14/92	15	STIPULATION between the defendants to extend the motion cut-off date (1010) [Entry date 10/15/92]
10/14/92	–	SCHEDULE: by Judge Patrick J. Duggan deadline for filing motions set for 11/15/92 (1079) [Entry date 10/15/92]
10/14/92	–	EXCLUDABLE interval of type XT beginning 10/15/92 and ending 11/15/92 per stipulation entered 10/14/92 (1079) [Entry date 10/15/92]
10/16/92	17	ORDER by Judge Patrick J. Duggan, extending motion cut-off (1074) [Entry date 10/19/92]

10/16/92 – EXCLUDABLE interval of type XT beginning 11/16/92 and ending 1/5/93 per order extending motion cut-off [17-1] (1054) [Entry date 10/19/92]

10/16/92 – SCHEDULE: by Judge Patrick J. Duggan deadline for filing motions extended to 11/15/92, and criminal jury trial set for 8:45 1/5/93 for Vito Giacalone, for N.C. Deday LaRene (1079) [Entry date 10/20/92]

10/27/92 18 STIPULATION and order by Judge Patrick J. Duggan, extending motion cut-off (1074) [Entry date 10/29/92]

10/27/92 – EXCLUDABLE interval of type XT beginning 11/15/92 and ending 11/30/92 per order extending motion cut-off [18-1] (1079) [Entry date 10/30/92]

10/27/92 – SCHEDULE: by Judge Patrick J. Duggan deadline for filing motions set for 11/30/92 (1079) [Entry date 10/30/92]

* * *

11/30/92 23 STIPULATION and order by Judge Patrick J. Duggan extending discovery cutoff and scheduling deadline for filing motions (1054) [Entry date 12/01/92]

11/30/92 – SCHEDULE: by Judge Patrick J. Duggan deadline for filing motions set for 12/7/92 (1114) [Entry date 12/02/92]

* * *

12/10/92 37 NOTICE of Rescheduled criminal jury trial (1173) [Entry date 12/11/92]

12/15/92 38 STIPULATION and order by Judge Patrick J. Duggan, extending time to file a

response to the defendants. (1173) [Entry date 12/16/92]

1/14/93 40 STIPULATION and order by Judge Patrick J. Duggan, extending government's time to file a response to the defendants' motions (1080) [Entry date 01/15/93]

1/14/93 41 MOTION and order by Judge Patrick J. Duggan to adjourn trial date (1080) [Entry date 01/15/93]

1/14/93 – SCHEDULE: criminal jury trial set for 3/22/93 for Vito Giacalone, for N.C. Deday LaRene (1086) [Entry date 01/19/93]

1/14/93 – SCHEDULE: deadline for filing motions set for 1/25/93 (1086) [Entry date 01/19/93]

1/14/93 – EXCLUDABLE interval of type XT beginning 1/21/93 and ending 3/22/93 per order to adjourn trial date [41-1] (1087) [Entry date 02/22/93]

1/15/93 42 NOTICE of pretrial (1080) [Entry date 01/19/93]

1/15/93 – SCHEDULE: pretrial conference set for 3:00 1/27/93 for Vito Giacalone, for N.C. Deday LaRene (1086) [Entry date 01/19/93]

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1/26/93 – SCHEDULE: by Judge Patrick J. Duggan pretrial conference re-set for 2:00 1/29/93 for Vito Giacalone, for N.C. Deday LaRene (1079) [Entry date 01/27/93]

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2/3/93	51	NOTICE of rescheduled Jury trial (1173) [Entry date 02/04/93]
2/3/93	–	EXCLUDABLE interval of type XE ended (1086) [Entry date 02/04/93]
2/3/93	–	SCHEDULE: by Judge Patrick J. Duggan criminal jury trial set for 8:45 6/14/93 for Vito Giacalone, for N.C. Deday LaRene (1114) [Entry date 02/05/93]
2/3/93	–	EXCLUDABLE interval of type XT beginning 3/22/93 and ending 6/14/93 per order [41-2] (1087) [Entry date 02/16/93]

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3/15/93	61	ORDER by Judge Patrick J. Duggan granting motion for severance and separate trial by Vito Giacalone [25-1], granting motion for severance and separate trial by N.C. Deday LaRene [31-1] (1054) [Entry date 03/16/93]
3/15/93	–	EXCLUDABLE interval of type XE ended (1086) [Entry date 03/16/93]

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5/12/93	66	WRIT by Judge Patrick J. Duggan for production of documents from telephone numbers leased by Albert A. Allen and/or Barbara Allen, 32802 Barclay Square, Warren, Michigan (1074) [Entry date 05/20/93]
5/14/93	63	NOTICE of status conference (1092) [Entry date 05/17/93]
5/19/93	65	WRIT by Judge Patrick J. Duggan for production of records from Michigan Bell

Telephone Company (1074) [Entry date 05/20/93]

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6/9/93	68	STIPULATION and order by Judge Patrick J. Duggan, adjourning trial (1074) [Entry date 06/10/93]
6/9/93	68	STIPULATION and order by Judge Patrick J. Duggan, criminal jury trial (1074) [Entry date 06/10/93]
6/9/93	–	SCHEDULE: by Judge Patrick J. Duggan criminal jury trial re-set for 8:45 7/12/93 for Vito Giacalone, for N.C. Deday LaRene (1079) [Entry date 06/10/93]
6/9/93	–	EXCLUDABLE interval of type XT beginning 6/14/93 and ending 7/12/93 per order adjourning trial [68-1] (1079) [Entry date 06/11/93]
8/31/93	69	NOTICE of rescheduling jury trial (1080) [Entry date 09/01/93]
8/31/93	–	SCHEDULE: by Judge Patrick J. Duggan criminal jury trial re-set for 8:45 10/19/93 for Vito Giacalone, for N.C. Deday LaRene (1079) [Entry date 09/01/93]
11/16/93	–	MINUTE SHEET of proceedings before Judge Patrick J. Duggan – for appearance of material witness Allen Albert warrant dismissed D/Atty: David Griem AUSA: Keith Corbett – Court Reporter: Marie Metcalf (1086) [Entry date 11/17/93]
11/17/93	70	MOTION and order by Magistrate Judge Steven D. Pepe for, unseal material witness arrest warrant (1074) [Entry date 11/24/93]

12/21/93 71 RULE 11 plea agreement by defendant Vito Giacalone (1054) [Entry date 12/22/93]

12/21/93 – PLEA held as to defendant Vito Giacalone, plea of guilty by Vito Giacalone (1) count(s) 1, defendant Vito Giacalone referred to probation – Judge Patrick J. Duggan – ECR: Marie Metcalf (1053) [Entry date 12/22/93]

12/21/93 – EXCLUDABLE interval of type XE ended per plea. (1053) [Entry date 12/22/93]

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12/21/93 72 RULE 11 plea agreement by defendant N.C. Deday LaRene (1054) [Entry date 12/22/93]

12/21/93 73 SUPERSEDING information against N.C. Deday LaRene (3) count 1s (1164) [Entry date 12/27/93]

12/21/93 74 WAIVER of indictment by defendant N.C. Deday LaRene and attorney David DuMouchel for Robert Morgan (1164) [Entry date 12/27/93] [Edit date 12/27/93]

12/21/93 – EXCLUDABLE interval of type XE ended defendant N.C. LaRene's motion to allow hybrid presentation (1164) [Entry date 12/27/93]

12/22/93 – EXCLUDABLE interval of type XE ended (1079) [Entry date 12/23/93]

12/22/93 – ARRAIGNMENT held as to defendant N.C. Deday LaRene, plea of guilty by N.C. Deday LaRene (3) count(s) 1s – guilty plea taken under advisement –

continue own recognizance bond as to defendant N.C. Deday LaRene, defendant N.C. Deday LaRene referred to probation – Judge Patrick J. Duggan – D/Atty: David DuMouchel for Robert Morgan – AUSA: Keith Corbett – Court Reporter: Marie Metcalf (1164) [Entry date 12/27/93]

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5/4/94 – SENTENCING held as to defendant N.C. Deday LaRene – Judge Patrick J. Duggan – D/Atty: Robert Morgan – AUSA: Keith Corbett – Court Reporter: Marie Metcalf (1123) [Entry date 05/06/94]

5/4/94 77 JUDGMENT and commitment order entered by Judge Patrick J. Duggan sentencing N.C. Deday LaRene (3) count(s) 1s, 1 (1173) [Entry date 05/09/94]

5/5/94 76 MOTION and order by Judge Patrick J. Duggan for, to dismiss count(s) as to N.C. Deday LaRene (3) count(s), 2,3 (1173) [Entry date 05/06/94]

5/20/94 78 STIPULATION and order by Judge Patrick J. Duggan extending time for defendant to report N. C. Deday La Rene (1054)

5/23/94 – SENTENCING held as to defendant Vito Giacalone – Judge Patrick J. Duggan – Court Reporter: Marie Metcalf (1086) [Entry date 05/24/94]

5/23/94	79	JUDGMENT and commitment order entered by Judge Patrick J. Duggan sentencing Vito Giacalone (1) count(s) 1, disposing of count(s) as to Vito Giacalone (1) count(s) 2,3 (1092) [Entry date 05/26/94]
6/6/94	81	MOTION and order by Judge Patrick J. Duggan dismissing counts 2 and 3 as to Vito Giacalone (1) (1054) [Entry date 06/07/94]
6/8/94	82	MOTION by defendant Vito Giacalone for extension of date of reporting to designated institution, with proof of mailing (1080) [Entry date 06/09/94]
6/9/94	83	ORDER by Judge Patrick J. Duggan amending judgment and commitment order to extend date to report to designated institution until 7/5/94 [79-3] (1054) [Entry date 06/13/94]

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8/3/94	86	JUDGMENT and commitment order returned as to defendant N.C. Deday LaRene (1080) [Entry date 08/05/94]

[END OF DOCKET: 2:92cr80848-1,3]

Obituary published in Detroit Free Press/Detroit News joint edition on Sunday, March 24, 1996

ALBERT ALLEN

Owned Warren juice company

Albert A. Allen, 69, the retired owner of a juice company, died of complications from a stroke Friday, March 22, 1996, in Macomb Hospital in Warren.

The Warren resident operated Everfresh Juice Co. until he retired in 1987. He also raced thoroughbred horses at Detroit Race Course and in Chicago and New Orleans. During World War II, he served with an Army airborne division.

Survivors include his wife, Barbara; a son, Albert; and three grandchildren.

Visitation is 1-10 p.m. today at A.H. Peters Funeral Home, 32000 Schoenherr in Warren. Services will be at 10 a.m. Monday in the funeral home. The body will be cremated.

Memorials may be sent to Capuchin Monastery and Soup Kitchen, 1760 Mt. Elliott, Detroit, Mich. 48207.